No. 92-515

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF WISCONSIN,
Petitioner,

v.

TODD MITCHELL,
Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

Brief For Members Of Congress Charles E. Schumer, F. James Sensenbrenner, Jr., Steven Schiff, Patricia Schroeder, Peter Deutsch, Carolyn B. Maloney, Norman Y. Mineta, Bill Richardson, Pat Williams, Fortney H. (Pete) Stark, Dan Glickman, Jerrold Nadler, Romano L. Mazzoli, William J. Hughes, Mel Reynolds, Walter R. Tucker III, Martin Frost, Kweisi Mfume, David A. Levy, Bobby L. Rush, William Clay, George E. Sangmeister, Constance A. Morella, Frank Pallone, Jr., Major R. Owens, Julian C. Dixon, Cardiss Collins, Robert A. Underwood, Albert Russell Wynn, Jim Ramstad, Robert C. Scott, Nydia M. Velazquez, Howard L. Berman, Gerry E. Studds, Robert G. Torricelli As Amici Curiae Supporting Petitioner

STEVEN T. CATLETT
(Counsel of Record)
RICHARD A. CORDRAY
JONES, DAY, REAVIS
& POGUE
1900 Huntington Center
Columbus, OH 43215
(614) 469-3939

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES - Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-515

STATE OF WISCONSIN,

Petitioner,

v.

TODD MITCHELL,

Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

Brief For Members Of Congress Charles E. Schumer, F. James Sensenbrenner, Jr., Steven Schiff, Patricia Schroeder, Peter Deutsch, Carolyn B. Maloney, Norman Y. Mineta, Bill Richardson, Pat Williams, Fortney H. (Pete) Stark, Dan Glickman, Jerrold Nadler, Romano L. Mazzoli, William J. Hughes, Mel Reynolds, Walter R. Tucker III, Martin Frost, Kweisi Mfume, David A. Levy, Bobby L. Rush, William Clay, George E. Sangmeister, Constance A. Morella, Frank Pallone, Jr., Major R. Owens, Julian C. Dixon, Cardiss Collins, Robert A. Underwood, Albert Russell Wynn, Jim Ramstad, Robert C. Scott, Nydia M. Velazquez, Howard L. Berman, Gerry E. Studds, Robert G. Torricelli As Amici Curiae Supporting Petitioner

---

CONSENT TO FILING

This brief *amici curiae* is filed pursuant to Supreme Court Rule 37.3, with the written consent of all parties in interest. Letters of consent have been filed with the Clerk of this Court.

INTEREST OF THE AMICI CURIAE

The United States Congress is now considering legislation that would enhance the sentences of criminals who commit hate crimes. The Federal legislation, which is entitled the "Hate Crimes Sentencing Enhancement Act," was originally introduced in the last session of the Congress by Representative Charles E. Schumer in the House, *see* H.R. 4797, 102d Cong., 2d Sess. (1992), and by Senator Paul Simon in the Senate, *see* S. 2522, 102d Cong., 2d Sess. (1992). The proposal, which was approved by voice vote in the House Committee on the Judiciary, passed the House also by voice vote. The bill failed to pass the Senate only because of an objection raised by a single Senator, which was sufficient to block the measure under the rigid parliamentary strictures that were imposed in the final hours of the 102d Congress. The same measure is being reintroduced in the current session of Congress by Representatives Charles E. Schumer and F. James Sensenbrenner, Jr., who serve respectively as the Chairman and the ranking Minority member of the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary.

The Federal legislation would operate by directing the United States Sentencing Commission to adopt guidelines to increase, by not less than three offense levels, the sentence received for a Federal offense that is determined to be a hate crime. "Hate crime" is defined under the bill as "a crime in which the defendant's conduct was motivated by hatred, bias or prejudice, based on the actual or perceived race, color, religion, national origin, ethnicity, gender, or sexual orientation of another individual or group of individuals." Raising an offense by three severity levels equates to an average sentence enhancement of one-third real time served.

The Congress is seeking to combat a veritable epidemic of hate crime that is sweeping our country. Though certainly not new to our society, instances of violence and destruction of property where victims are targeted on the basis of race or religion or other specified status are occurring with alarming frequency. In 1990, Congress passed the Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990), which seeks to measure the true extent of bias-related crime in the United States. The pending legislation is a stronger measure that authorizes more severe punishment under Federal law for such crimes, which can often terrorize whole communities.

Last year, the House Committee on the Judiciary's Subcommittee on Crime and Criminal Justice held two hearings on the proposed legislation, one in Brooklyn, New York, and one in Washington, D.C. The testimony at those hearings strongly demonstrated the urgent need for stiffer penalties against hate crimes, in particular by illustrating the unique harm that attaches to such crimes and their pervasive and destructive impact on our communities. It also established on firm grounds the constitutionality of sentence enhancement provisions imposed on those who commit hate crimes. The extensive testimony that was received in the Subcommittee on the constitutionality of the proposed legislation was presented and discussed *after* the Court's recent decision in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), which invalidated not a hate *crimes* law, but a hate *speech* ordinance under the First Amendment.

Although the language and potential operation of the proposed Federal law both differ from the Wisconsin penalty enhancement statute at issue in this case, the two measures are similar in purpose. Therefore, the *amici curiae* Members of Congress respectfully wish to present the Court with observations about the constitutionality of sentencing enhancements for perpetrators of hate crimes. These observations are grounded in the *amici curiae*'s findings on the need for and the purpose of proposed hate crimes laws, which have been developed extensively in the congressional hearing process. Based on this background, we urge the Court to recognize both the compelling government

interests at stake in punishing hate crimes and the close nexus between that punishment and the *conduct* that is proscribed under sentencing enhancement laws.

ISSUE PRESENTED

Does the First Amendment to the United States Constitution prohibit states from providing greater maximum penalties for crimes if a fact-finder determines that a criminal offender intentionally selected his or her crime victim because of the victim's race, color, religion, or other specified status?

SUMMARY OF ARGUMENT

1. The Wisconsin statute at issue here, Wis. Stat. § 939.645 (1989-90), is a penalty enhancement device. As such, it applies only to punish *conduct*, not speech. Indeed, the statute does not draw any distinctions based on speech, the content of speech, or the consequences of speech. Instead, it simply enhances the punishment for conduct, already otherwise criminal, when the perpetrator "[i]ntentionally selects" the victim based on specified characteristics.

2. The rationale for such laws is that the criminal conduct is more heinous and reprehensible, and the potential harm is greater, when the perpetrator intentionally targets a victim in this manner. That judgment, which has been reached by an overwhelming majority of state legislatures and is currently being documented in the United States Congress as well, is readily defensible given the pervasive and destructive impact of hate crimes.

3. A sentence enhancement for intentional selection of a crime victim based on specified characteristics does not violate the Constitution. The targeting of a victim, even or perhaps especially when the targeting is based on discriminatory motivation, does not constitute protected speech or thought under the First Amendment. Moreover, this penalty enhancement law operates in exactly the same manner as do the antidiscrimination laws already on the books at the Federal and state levels. Those

laws have been broadly accepted as constitutional throughout this country. If government can punish otherwise lawful acts, such as hiring and firing employees, when those acts are deliberately undertaken based on specified characteristics of individuals, then *a fortiori* the government can enhance the punishment for criminal conduct when that conduct is deliberately undertaken based on the same kinds of specified characteristics.

4. The Court has explicitly recognized that it is permissible to consider racial animus and similar motivations when determining the sentence for crime. Indeed, the Court found this approach to be constitutional even in the highly sensitive context of capital sentencing. No serious argument exists to the contrary under the statute at issue here.

5. That proof of motivation may require the adducement of spoken comments does not differentiate the application of these laws from any trial in which the defendant's statements may be introduced to show both the defendant's state of mind and the actions that occurred. It is no different, in particular, from the trial of alleged violations of the antidiscrimination laws. A determination that the use of such statements -- which include confessions and admissions -- poses constitutional problems would create wholesale disruption of the trial process.

6. This law also is not overbroad. Again, it does not criminalize any expression whatsoever, let alone any amount that would be substantial enough to create an overbreadth problem. In particular, unlike the law at issue in *R.A.V.*, this measure does not make criminal any expressive conduct based on the reactions that may be caused in other individuals. The close nexus between this statute and properly proscribed conduct -- both criminal acts and the intentional selection of a victim based on specified characteristics -- negates any overbreadth challenge.

ARGUMENT

I. THIS PENALTY ENHANCEMENT STATUTE DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE IT PUNISHES CRIMINAL CONDUCT THAT IS PROPERLY PROSCRIBED, AND DOES NOT PUNISH EITHER THE CONTENT OR THE CONSEQUENCES OF SPEECH, AS IS ALSO TRUE OF OTHER ANTIDISCRIMINATION LAWS

1. The Wisconsin statute at issue here is a penalty enhancement device. Punishment is enhanced under the statute when the person who commits a crime "[i]ntentionally selects" the victim because of certain specified characteristics. Wis. Stat. § 939.645(1)(b). Thus, the statute applies only to punish *conduct*: the act of intentionally selecting a victim based on one of the specified grounds. The law does not in any way punish mere speech or association.

The court below thus misapprehended the effect of this law when it stated that "the hate crimes statute punishes bigoted thought." Pet. A8. The statute does not draw any distinctions based on speech or thought. Nor does it enhance punishment based on the content of speech or thought. If an individual is prejudiced against other individuals based on the characteristics specified in the statute, those thoughts are immune from punishment. If the individual articulates those thoughts by some means, including offensive means (which is akin to the expressive conduct that was at issue in *R.A.V.*), that again is mere speech, not reached by the statute. But when the individual moves into action by deliberately selecting and engaging in criminal conduct against a victim based on those specified characteristics, the proper constitutional limits of free expression have been passed. By the act of premeditation, of intentional selection, the individual

has created a legitimate justification for heightened punishment of the ensuing criminal conduct.[1]

There is no question that the intentional selection of a victim, which moves beyond any protected area of belief to constitute a mental act, can be considered a separate factor that warrants more severe punishment under the law. For example, under Federal law the "unlawful killing of a human being" constitutes manslaughter. 18 U.S.C. § 1112. But if the same killing is done "with malice aforethought," the crime is murder and a more severe punishment can be levied. *Id.* § 1111. Proof that the perpetrator intentionally selected the victim and thus premeditated the crime suffices to show the additional element necessary to establish murder. In addition, the intentional selection of a victim is considered to be so significant by itself that it suffices to establish the crime of murder *even if in the end someone else is killed instead*. *Id.*; *see, e.g.*, *United States v. Sanchez*, 741 F. Supp. 215 (S.D. Fla. 1990). The premeditation increases both the intrinsic heinousness and the potential harm of such a crime, and thus warrants the additional punishment. But all of these considerations are a far cry from laws abridging speech or expression, such as a law that imposes "special prohibitions on those speakers who express views on disfavored subjects." *R.A.V.*, 112 S. Ct. at 2547.

2. Likewise, the court below erred when it concluded that the "hate crimes statute violates the First Amendment directly by punishing what the legislature has deemed to be offensive thought." Pet. A7. This law in no way seeks to punish an individual based on the content of speech or thought, such as for harboring personal biases or prejudices. What it punishes,

---

[1] To adapt Thomas Jefferson's famous argument, what another *believes* cannot rightly be punished, since it "neither picks my pocket nor breaks my leg." Thomas Jefferson, *Notes on the State of Virginia*, Query 17. But when one actually does intentionally select and then undertake criminal activity against the person or property of another, as is true with any violation of this statute, those acts can be punished consistent with the Constitution.

instead, are acts of crime; the punishment is enhanced when the criminal perpetrator also intentionally selects the victim based on specified characteristics. The rationale for such laws is not that offensive thought must be punished because it is somehow intrinsically dangerous or because of the reaction it may provoke in others. Instead, the documented rationale for hate crimes laws is that the harm is greater, and the criminal conduct more heinous and reprehensible, when the perpetrator intentionally selects a victim in this manner.

It is by now widely recognized that ordinary crimes become far more harmful and pervasive when they are undertaken as hate crimes by intentionally targeting the victim based on specified characteristics. As the committee report on H.R. 4797 concluded: "These crimes are not ordinary crimes of violence and destruction of property. Crimes of hate transcend their immediate victims and cast a shadow of fear and terror throughout entire communities." H.R. Rep. No. 981, 102d Cong., 2d Sess. 3 (1992). There are several reasons why this is so.

First, scientific studies have documented that crimes are more severe, and the harm to the victim is greater, when the motive is racial or ethnic discrimination. *See, e.g.*, Jack McDevitt, *The Study of the Character of Civil Rights Crimes in Massachusetts (1983-1987)*, July 1989, at 17, *available in* ERIC, File No. ED315469 (assaults that are hate crimes require hospitalization of the victim four times more often than do other assaults). The case at hand, for example, involved the severe beating of a youth that left him in a coma for four days with possibly permanent brain damage. The level of violence is often higher because hate crimes tend to be committed by groups of people against a solitary victim, *see id.* at 15, as happened in this case.

Second, hate crimes have a more pervasive impact than is found with ordinary crimes. Motivations such as racial, religious, or ethnic hatred are more likely to result in a pattern of criminal conduct than are crimes directed solely at a particular individual. And because they are targeted against specified groups of people, hate crimes create a very real danger of escalating recriminations

and retaliations throughout the community. As one court has described:

> Assaultive behavior motivated by bigotry is directed not just at the victim but, in a sense, toward the group to which the particular victim belongs. Such confrontations therefore readily -- and commonly do -- escalate from individual conflicts to mass disturbances. That is a far more serious potential consequence than that associated with the usual run of assault cases.

State v. Beebe, 680 P.2d 11, 13 (Or. App.), *review denied*, 683 P.2d 1372 (Or. 1984).

Third, the incidence of hate crimes is rising. *See* H.R. Rep. No. 981, *supra*, at 3 ("By all indications, the level of violence inspired by bigotry and hate is rising."); *see also* Daniel Goleman, *As Bias Crime Seems to Rise, Scientists Study Roots of Racism*, N.Y. Times, May 29, 1990, at B5 ("Everybody who collects data reports a steady increase in hate crimes in the last year or two."). The recent effort to document more fully the true statistics on these crimes reveals "an alarming trend of increasing racial violence against minorities in the United States, dramatizing the intense racial hatred and prejudice that still plague this country." Note, *Combatting Racial Violence: A Legislative Proposal*, 101 Harv. L. Rev. 1270 (1988) (citing sources). For all of these reasons, the government obviously has an important interest in seeking to impose enhanced penalties on hate crimes.

A legislature therefore can readily determine that the act of intentionally selecting a criminal victim based on certain specified characteristics is more harmful and more deserving of punishment

than the same underlying criminal activity standing alone.[2] It is precisely that judgment which has been reached by an overwhelming majority of state legislatures and is currently being documented in the United States Congress. The proper conclusion is not that the government thereby is seeking to punish "offensive thought," but instead that it has crafted an appropriate and proportional response to the underlying conduct involved in the admittedly pervasive and destructive impact of hate crimes.[3]

This distinction is underscored by a hypothetical that is advanced by the Court in *R.A.V.* There the Court took care to distinguish between "a prohibition of fighting words that are *directed at* certain persons or groups (which would be facially valid if it met the requirements of the Equal Protection Clause)," 112 S. Ct. at 2548 (emphasis added), and "a prohibition of fighting words that contain . . . messages of 'bias-motivated' hatred," which the Court found to be facially invalid. *Id.* This comparison illustrates that the Court's real concern in *R.A.V.* was

---

[2] In like fashion, a legislature can properly determine that crimes committed against other classes of individuals warrant a stiffer response if there is a reasonable factual basis for that determination. *See, e.g.*, 18 U.S.C. § 2251 (criminal penalties for sexual exploitation of children); *id.* § 1751 (criminal penalties for assassination, kidnaping, or assault of the President or Presidential staff).

[3] Even if the Court thought that this penalty enhancement law somehow mixed "speech" and "non-speech" elements, its constitutionality can also be shown based on *United States v. O'Brien*, 391 U.S. 367 (1968). Under *O'Brien*, where "'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." *Id.* at 376. In that decision, the Court upheld the conviction of a man who burned his draft card in protest of the Vietnam War because the law prohibiting its destruction furthered "an important or substantial governmental interest . . . unrelated to the suppression of free expression." *Id.* at 377. This is even more true of the penalty enhancement statute here, which does not regulate or prohibit any symbolic or expressive conduct. *Cf. United States v. Eichman*, 496 U.S. 310, 313-15 (1990).

the government's attempt to punish *speech* based on *content* by criminalizing those "who express views on disfavored subjects." *Id.* at 2547.[4] But the mere act of intentionally selecting "certain persons or groups" as targets was not judged by the Court to pose any real constitutional problem, even if the victims were only verbally affronted rather than physically assaulted. *Cf. R.A.V.*, 112 S. Ct. at 2565 (Stevens, J., concurring) (government "may determine that threats based on the target's race, religion, or gender cause more severe harm to both the target and to society than other threats.").[5]

3. Given the clear validity of a penalty enhancement that is based on intentional selection of the crime victim, the only question is whether such an enhancement somehow becomes constitutionally invalid when it is tied to intentional selection of the victim based on specified characteristics. This argument (which is quite odd in light of the weighty justification for protecting the public against criminals who target their victims on

---

[4] *See also R.A.V.*, 112 S. Ct. at 2542 ("the ordinance is facially unconstitutional in that it prohibits otherwise permitted *speech solely on the basis of the subjects the speech addresses*") (emphasis added); *id.* at 2548 ("The point of the First Amendment is that majority preferences must be expressed in some fashion other than *silencing speech on the basis of its content.*") (emphasis added).

[5] The Court's sole caveat in this passage -- that attempts to punish the intentional targeting of "certain persons or groups" must be evaluated under the Equal Protection Clause, 112 S. Ct. at 2548 -- demonstrates again that the Wisconsin penalty enhancement statute is plainly constitutional. The caveat raised by the Court indicates that punishments for the intentional targeting of victims which lack any rational basis (such as a law based on whether the victim is a Republican or a Democrat, or the like) are still vulnerable under other constitutional provisions. But they do not, properly understood, present any serious *free speech* problem. The *amici curiae* would note that no issue is raised in this case under the Equal Protection Clause; the lower courts found that respondent had waived any such claim. Pet. A55. In any event, the rational basis that underlies penalty enhancement laws for hate crimes is evident.

just such bases) must ultimately fail. The intentional targeting of crime victims based on specified characteristics does not attain constitutional protection simply because it stems from bias or prejudice.

On the contrary, the Court recently declared: "Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." *R.A.V.*, 112 S. Ct. at 2546-47. This has always been the Court's view. Motivations of racial, religious, or ethnic discrimination have never been afforded affirmative protection under the First Amendment. Indeed, the Court has repeatedly rejected such assertions:

> [A]lthough the Constitution does not proscribe private bias, it places no value on discrimination as it does on the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.

Norwood v. Harrison, 413 U.S. 455, 469-470 (1973); *see also New York State Club Ass'n v. New York City*, 487 U.S. 1, 13 (1988); *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984). If this is so in the context of nonviolent discrimination when choosing one's own associates, it is so even more powerfully where the same discriminatory motivations spawn criminal actions against person or property. *Cf. Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984) ("like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, [discriminatory] practices are entitled to no constitutional protection").

Indeed, a sentence enhancement for intentional selection of a crime victim based on specified characteristics operates in exactly the same manner as do the legion of Federal and state antidiscrimination statutes -- laws that this Court has expressly upheld as constitutional. *See Heart of Atlanta Motel, Inc. v.*

United States, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964). Under those laws, activities that are otherwise wholly lawful, such as hiring and firing employees, become illegal when they are undertaken based on the specified characteristics of individuals. *See, e.g.*, 42 U.S.C. § 2000e-2. It is precisely the discriminatory *motive* that creates the illegality of such activities in cases involving disparate treatment, *see, e.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) ("Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."), and which therefore must be proved before individuals can be subjected to punishment under those provisions. Yet it has never even been suggested that these measures may somehow violate the First Amendment.

By the same logic, the government can enhance punishment for criminal conduct when that conduct is deliberately undertaken based on the same kinds of specified characteristics. This point is made forcibly by the dissent below. It simply cannot be, as Justice Bablitch observes, "that the same Constitution which does not protect discrimination in the marketplace does protect discrimination that takes place during the commission of a crime." Pet. A27.[6]

Such penalty enhancement schemes are in fact just a more modest form of the Federal laws against genocide. Those laws apply to anyone who targets "a national, ethnic, racial, or religious group" for certain acts of criminal violence "with the specific intent to destroy [that group] in whole or in substantial part." 18 U.S.C. § 1091(a). That statute was enacted to implement the International Convention on the Prevention and Punishment of the Crime of Genocide, which was drafted shortly after World War II, "when the horrors of the Holocaust were exposed and the cruel and inhuman actions of Hitler's Nazi regime were fresh in the minds of the world community." S.

---

[6] *Cf.* 18 U.S.C. § 242 (imposing criminal penalties on one who subjects another to "different punishments, pains, or penalties" under color of law because the other is "an alien, or by reason of his color, or race").

Rep. No. 333, 100th Cong., 2d Sess. 2 (1988). The only difference between the Federal law punishing genocide and the penalty enhancement at issue in this case is that the Federal law requires proof also of specific intent to destroy the targeted group -- a difference that does not carry constitutional significance in this instance.

II. THE COURT HAS EXPLICITLY HELD THAT THE CONSTITUTION PERMITS FACTORS SUCH AS RACIAL MOTIVATION TO BE CONSIDERED IN DETERMINING THE APPROPRIATE PUNISHMENT FOR CRIME, EVEN WHERE SPOKEN WORDS MUST SERVE AS PROOF

1. It certainly does not violate the First Amendment for the prosecution of a crime to require inquiry to be made into the defendant's mental processes and thoughts or beliefs. On the contrary, this is a commonplace in the criminal law. And the Court has explicitly said that proof the defendant was motivated by racial hatred, in particular, can be used to increase the punishment for crime. Indeed, the Court has judged this practice to be constitutional even in the more sensitive context of capital sentencing.

In *Barclay v. Florida*, 463 U.S. 939 (1983), a plurality of the Court declared that the "Constitution does not prohibit a trial judge from taking into account the elements of racial hatred" in determining whether the death penalty is appropriate in a murder case. *Id.* at 949. The trial judge had discussed the racial motive for the murder as a partial explanation for his decision to sentence the defendant to death, and had expressly compared this crime to the practices of Nazi concentration camps. The Court found that the defendant's racial motivation could well be relevant in assessing aggravating circumstances that hinged on the defendant's mental state. *Id.* at 948-49.

In *Dawson v. Delaware*, 112 S. Ct. 1093 (1992), the Court observed that "the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and

associations" in determining the penalty for crime. *Id.* at 1097. The Court stressed that if such evidence is relevant to the commission of a crime, or to the harm done by criminal conduct, then it is properly considered in fixing an appropriate sentence.[7] Thus the Court cited *Barclay* with approval and reaffirmed that "evidence of racial intolerance" could properly be considered in determining the proper sentence for crime, as long as it is relevant to the factual issues raised. *Id.* This would be so, for example, where "elements of racial hatred" are actually "involved in" the commission of the crime. *Id.* at 1098.[8]

2. In addition, the use of spoken comments to prove motivation, as part of the larger process of establishing both the defendant's actions and state of mind, is an ordinary feature of the trial process, which does not in itself raise any First Amendment problem. In *Barclay*, for example, the racial motivation for the crime was shown by the contents of a written note (styled as a "[w]arning to the oppressive state") and of tape-recorded comments. 463 U.S. at 942-44.

Moreover, the use of speech to effect the intentional selection of a victim by a predatory group of criminals, as occurred in this case, does not confer any protection upon the perpetrators under

---

[7] In *Dawson* itself, the Court was unable to find any "evidence showing more than mere abstract beliefs on Dawson's part," 112 S. Ct. at 1098, and in particular could find no link between the defendant's mere membership in a racist group and either the crime committed or the harm done by that crime. By contrast, the intentional selection of a criminal victim based on specified characteristics is made directly punishable by the Wisconsin penalty enhancement statute, and the special harms that ensue from such targeting of crime victims are manifest.

[8] In *Dawson*, the Court found no constitutional bar to the admission of "evidence concerning one's beliefs and associations" in determining the penalty for crime, *even where* those beliefs and associations are independently protected by the First Amendment. 112 S. Ct. at 1097. In this case, however, as has been demonstrated already, respondent's discriminatory motivation for intentionally selecting his victim is not independently protected by the First Amendment.

the First Amendment. Instead, it is uniformly understood that an "illegal course of conduct is not protected by the First Amendment merely because the conduct was in part carried out by language in contrast to direct action." *United States v. Gilbert*, 813 F.2d 1523, 1529 (9th Cir.), *cert. denied*, 484 U.S. 860 (1987) (rejecting constitutional challenge to the criminal provisions of the Fair Housing Act that apply to willfully injuring, intimidating, or interfering with equal access to housing); *United States v. Redwine*, 715 F.2d 315, 321-22 (7th Cir. 1983), *cert. denied*, 467 U.S. 1216 (1984) (affirming conviction under same statute by relying on racial epithets that defendant shouted while engaging in criminal acts to establish a racial motivation for his acts).

In sum, the determination of whether a criminal defendant intentionally targeted the victim based on specified characteristics necessarily involves an examination of the defendant's mental processes in conceiving and committing the crime. And, as the court below noted, speech "may often be used as circumstantial evidence to prove the actor's intentional selection." Pet. A18. But this prospect, in itself, certainly does not render the penalty enhancement statute unconstitutional. On the contrary, the broad application of any such principle would totally undermine the ordinary criminal trial process.

III. THIS PENALTY ENHANCEMENT STATUTE IS NOT OVERBROAD BECAUSE IT DOES NOT INCLUDE WITHIN ITS SWEEP ANY CONSTITUTIONALLY PROTECTED EXPRESSION OR "CHILL" ANY PROTECTED SPEECH

This law also is not overbroad. The overbreadth doctrine, as a basis for invalidating statutes on their face to protect parties not themselves before the court, "is 'strong medicine' that is used 'sparingly and only as a last resort.'" *New York State Club Ass'n*, 487 U.S. at 14, quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). A statute must be upheld unless it is "substantially" overbroad, that is, unless there is "a realistic danger that the statute itself will significantly compromise recognized First

Amendment protections of parties not before the Court." *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). No such parties can be identified here.

The court below found overbreadth problems because it thought the penalty enhancement statute would chill speech relating to the specified characteristics. Pet. A18-19. Indeed, it apparently judged that this problem extended not only to an actual defendant accused of breaking this law, but also to potential defendants and even the entire populace. *Id.*

But this analysis misapplies the overbreadth doctrine, which applies only to prohibitions on *speech* or *expression*. The overbreadth doctrine does not immunize speech from being used as "circumstantial evidence," *id.* at A18, of a defendant's state of mind. It would be equally as incorrect to contend that the Federal laws against treason, *see* U.S. Const., art. III, § 3; 18 U.S.C. § 2381, are unconstitutionally overbroad because the not incidental consequence of such laws may be to chill speech among the populace that is critical of the government.

In particular, the use of speech as circumstantial evidence that an intentional selection has been made based on specified characteristics occurs routinely in trials under the antidiscrimination laws. Yet such laws certainly have a far more pervasive impact on free expression among the American public than will ever flow from penalty enhancement statutes.

Justice White's concurrence in *R.A.V.* sets forth the correct application of the overbreadth doctrine as applied to the St. Paul "hate speech" ordinance. That ordinance, as definitively construed by the Minnesota Supreme Court, made criminal "expressive conduct that causes only hurt feelings, offense, or resentment." 112 S. Ct. at 2560 (White, J., concurring). Such speech lies at the heart of the First Amendment, and cannot be prohibited simply because of the kind of general emotive reaction it may cause in others. *Id.* at 2559-60; *cf. City of Houston v. Hill*, 482 U.S. 451, 460 (1987) (holding ordinance that barred the verbal interruption of a police officer to be overbroad where "the

enforceable portion of the ordinance deals not with core criminal conduct, but with speech").

Here, by contrast, the intentional selection of a victim based on specified characteristics is tied by a tight nexus to the commission of criminal actions. Both are properly proscribed conduct, and as Justice White noted, "expression may be limited when it merges into conduct," *id.* at 2560 n.13.[9] This is, in fact, nothing more than classic overbreadth doctrine, the function of which "attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct," especially "harmful, constitutionally unprotected conduct" that is controlled by the criminal law. *Broadrick*, 413 U.S. at 615; *see also New York v. Ferber*, 458 U.S. 747, 770 (1982). But no speech or expressive conduct is itself made criminal under Wisconsin's penalty enhancement statute. In addition, the discriminatory motivation for criminal conduct that is covered by this law is not itself protected by the First Amendment. The penalty enhancement statute thus is not overbroad.

---

[9] The same distinction between laws punishing speech or expression and laws punishing conduct was drawn in an overbreadth context in *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989). There the court struck down as overbroad a university policy that banned "stigmatizing or victimizing" an individual on the basis of race and other characteristics, since the policy could be directly applied not only to prohibit conduct, but also to prohibit constitutionally protected speech if the speech were judged to be unseemly or offensive to others. *Id.* at 864-66. Yet the court approvingly noted that "[c]redible threats of violence or property damage made with the specific intent to harass or intimidate the victim because of his race, sex, religion, or national origin is [sic] punishable both criminally and civilly under Michigan law." *Id.* at 862. And the penalty enhancement statute at issue here, of course, does not involve not mere threats, but criminal actions themselves.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Brief for Petitioner, this Court should reverse the decision of the Wisconsin Supreme Court.

Respectfully submitted,

STEVEN T. CATLETT
(Counsel of Record)
RICHARD A. CORDRAY
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 469-3939

Counsel for Amici Curiae

January 28, 1993